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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No. 20150319
Cass County District Court No. 09-2014-CV-03427

Constellation Development, LLC,

Plaintiff/Appellant,

v.

Western Trust Company, Gary G. Hoffman, Trustee, and Dabbert Custom Homes, LLC,

Defendants/Appellees.

REPLY BRIEF OF PLAINTIFF/APPELLANT

Appeal from Memorandum Opinion and Order dated July 9, 2015 and Judgment entered on September 22, 2015, in the District Court, County of Cass, State of North Dakota, The Honorable Steven L. Marquart, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

LAW AND ARGUMENT

I. INTRODUCTION.

[¶1] Defendant/Appellee Dabbert Custom Homes, LLC ("Dabbert") and Defendant/Appellee Western Trust Company, Gary G. Hoffman, Trustee ("Western Trust") have each separately interposed Responses to Plaintiff/Appellant Constellation Development, LLC's ("Constellation") Appeal. As both Defendants' arguments fail to show that Constellation's right of first refusal was unambiguously replaced, merged, extinguished, or otherwise satisfied, neither Defendant is able to show that the District Court correctly decided for summary judgment in its favor. Western Trust also fails in its argument that Constellation did not sufficiently plead this matter, as North Dakota is a notice pleading state and has not adopted the Federal Iqbal-Twombly standard. Finally, Dabbert fails in its argument that Constellation did not adequately brief its Appeal as to the District Court's August 6, 2015 Order on Constellation's motion for reconsideration. The District Court's September 22, 2015 Judgment, and the preceding Orders upon which the Judgment is based, should be reversed, and the case remanded.

A. The District Court Erred in Determining the 2013 Purchase Agreement was Unambiguous in Western Trust's Favor

[¶2] Both Defendants rely heavily on N.D.C.C. § 9-07-16 to argue that the handwritten addition of the 2013 Purchase Agreement controls the printed portion of the 2013 Purchase Agreement. Their reliance on N.D.C.C. § 9-07-16 is misplaced. First, it ignores the contradictory language of the handwritten addendum itself. The handwritten language states: "This has changed to a three-

year purchase option to run concurrently." Both Defendants focus on the "changed" portion of the handwritten language and try to explain away the plain meaning of the term "run concurrently".

[¶3] Concurrent plainly means "[o]perating at the same time." Black's Law Dictionary (10th ed. 2014) (defining concurrent as "Operating at the same time; covering the same matters"); see also Merriam-Webster's Dictionary, http://www.merriam-webster.com/dictionary/concurrent (last accessed March 23, 2016) (defining concurrent as "operating or occurring at the same time", "running parallel", and "acting in conjunction"); The American Heritage Dictionary, https://www.ahdictionary.com/word/search.html?q=concurrent&submit.x=30&submit.y=24 (last accessed March 23, 2016) (defining concurrent as "[h]appening, existing, or done at the same time as something else"). Simply put, in order for something to run concurrently, it needs to have something to run concurrently with.

[¶4] An apt analogy is the running of concurrent criminal sentences. Without at least two criminal sentece***s***, a Judge cannot determine whether the sentences should run concurrently or consecutively. State v. Salveson, 2006 ND 169, ¶ 4, 719 N.W.2d 747 (holding that a after a Defendant pled guilty to aggravated reckless driving ***and*** driving under the influence, the "trial court ha[d] the authority to determine whether a sentence should run concurrent with or consecutive to another sentence").

[¶5] Courts must give meaning to every word in a contract. See Perschke v. Burlington Northern, Inc., 311 N.W.2d 564, 567 (N.D. 1981) ("In construing a contract or deed we must construe all provisions together and give meaning to

every sentence, phrase and word."). If the parties had intended to replace the right of first refusal with the purchase option, they simply could have stated "This has changed to a three-year purchase option" or they could have crossed out the term "First Right of Refusal". Instead, they included the term "to run concurrently". By doing so, the Court has to give meaning to such a term and the plain meaning of "concurrent" includes running at the same time as something else. That something else is the "First Right of Refusal". At the very least, an ambiguity exists in the interpretaion of the 2013 Purchase Agreement in both the handwritten addendum and its relation to the "First Right of Refusal" paragraph. Such an ambiguity cannot be resolved in a motion for summary judgment. See Hillerson v. Bismarck Public Schools, 2013 ND 193, ¶ 18, 840 N.W.2d 65.

[¶6] Both Defendants also spend time arguing about the parties' intentions. As the 2013 Purchase Agreement contains contradictory and ambiguous langauge, it is difficult to find the clear intentions of the parties from the 2013 Purchase Agreement. In essence, then, both Defendants are making factual arguments about the intentions of the parties. This only further goes to show that summary judgment was inappropriate, as such factual determinations, such as who drafted the handwritten addendum and whether the addendum should be interperted against that party, are best left to trial. See Graber v. Engstrom, 384 N.W.2d 307, 309 (N.D. 1986) ("[A]n ambiguity in a contract is construed most strongly against the party who prepared it and presumably looked out for his best interests in the process.").

[¶7] The District Court erred in determining that the 2013 Purchase Agreement was unambiguous in Western Trust's favor and this matter should be reversed and remanded for further proceedings on the proper construction of the 2013 Purchase Agreement.

B. Any Failure of the 2014 Purchase Agreement Had No Effect on Constellation's Right of First Refusal

[¶8] Both Defendants also spend a signficant amount of their Briefs talking about the exercise of Constellation's purchase option and the subsequent failure to complete the 2014 Purchase Agreement. The Defendants' focus on this issue is misplaced, as Constellation's exercise of its purchase option and the subsequent failure of the 2014 Purchase Agreement has no bearing on Constellation's right of first refusal. As Constellation has noted many times, the purchase option and the right of first refusal are separate and distinct contractual rights. See Robinson v. Gwinnett County, 722 S.E.2d 59, 61-62 (Ga. 2012). Constellation's exercise of the purchase option did not extinguish the right of first refusal, nor did the 2014 Purchase Agreement result in a merging of the right of first refusal. As Western Trust did not decide to sell the Property until it received the offer from Dabbert, Constellation's right of first refusal was never triggered.

[¶9] Neither Defendant points to any contractual language, statute, or case law which supports their argument that the exercise of Constellation's purchase option extinguishes the right of first refusal or that the right of first refusal was merged into the 2014 Purchase Agreement. Even following the failure of the 2014 Purchase Agreement, Constellation maintained its contractual right of first refusal and

Western Trust breached the 2013 Purchase Agreement by not presenting Dabbert's offer to Constellation in violation of that right of first refusal.

[¶10] Analogously, other states have reviewed "dual-option" contracts in which the right of first refusal was triggered first, but was not exercised by the holder of the right of first refusal. Such states have held that the purchase option survives the triggering of the right of first refusal. See Texaco, Inc. v. Creel, 292 S.E.2d 130, 134 (N.C. Ct. App. 1982) ("[T]he right of first refusal, designated an option to purchase, had no effect on the fixed price option."); see also Four Howards, Ltd. V. J & F Wenz Rd. Invest., L.L.C., 902 N.E.2d 63, 72 (Ohio Ct. App. 2008) (holding that a lessee's subordination to a third party of his option to purchase a property did not affect or extinguish the lessee's separate right of first refusal on the same property).

[¶11] As Constellation maintained two separate contractual rights to the Property, the failure of one of those rights had no effect and did not extinguish the other right, the right of first refusal.

C. North Dakota Has Not Adopted the Iqbal-Twombly Plausibility Standard and Should Not Adopt the Standard Here

[¶12] Western Trust relies heavily in its brief on the Federal Iqbal-Twombly standard of pleading. This too is misplaced. The North Dakota Rules of Civil Procedure require only that a claim for relief contain "a short and plain statement of the claim showing that the pleader is entitled to relief." N.D. R. Civ. Proc. 8(a)(1). This Court has stated: "Under the liberal pleading requirements of our Rules of Civil Procedure, a complaint need only place the defendant on notice as to the general nature of a plaintiff's claim. . . . The rules do not require the pleader to

recite all of the facts which will be used to prove the cause of action." Daley v. American Family Mut. Ins. Co., 355 N.W.2d 812 (N.D. 1984). This Court has additionally held:

> When determining the sufficiency of a plaintiff's claim, the court should look at the substance of the claim alleged and not merely at the language used. The determination of a claim's sufficiency should be tempered with a liberal construction in favor of upholding the plaintiff's right to be heard.

Gowin v. Hazen Memorial Hospital Association, 311 N.W.2d 554, 556 (N.D.1981).

[¶13] Like North Dakota, numerous other states have not adopted the Iqbal-Twombly standard. Several states have specifically refused to adopt the Iqbal-Twombly plausibility standard. See e.g., Walsh v. U.S. Bank, N.A., 851 N.W.2d 598, 606 (Minn. 2014) ("U.S. Bank has not presented a compelling reason, based on Rule 8.01's plain language, purpose and history, or context, to overrule Olson and Franklin. Accordingly, we decline to adopt the plausibility standard."); Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp., 812 N.W.2d 600, 608 (Ia. 2012) (holding that the Iowa state court system was not facing the same systemic pressures facing Federal courts which required a heightened "plausibility" standard); Roth v. DeFeliceCare, Inc., 700 S.E.2d 183, 189 n.4 (W. Va. 2010) ("Under West Virginia law, however, this Court has not adopted the more stringent pleading requirements as has been the case in federal court and all that is required by a plaintiff is 'fair notice.'").

[¶14] Similarly here, the North Dakota Supreme Court should not radically change its well-known and longstanding notice pleading standard to adopt the stringent Iqbal-Twombly plausibility standard. Western Trust has not shown any proof that

North Dakota requires such a drastic change. This is hardly the place, especially on a summary judgment motion and not a motion to dismiss, to make such a fundamental change.

[¶15] North Dakota has long used a liberal notice pleading standard and should continue to do so in this case. Constellation provided notice that it was making a breach of contract claim. Western Trust and Dabbert were well aware of such a claim. Constellation provided notice that it was making promissory estoppel and equitable estoppel claims. Western Trust was well aware of that. Constellation made "short and plain statements" that it is entitled to relief, which is sufficient under the North Dakota Rules of Civil Procedure.

D. Constellation Can Challenge the District Court's Denial of Its Motion for Reconsideration in This Appeal

[¶16] Dabbert argues that this Court cannot consider Constellation's challenge of the District Court's August 6, 2015 Order on Constellation's Motion to Reconsider because that Order was not mentioned in Constellation's Notice of Appeal. Dabbert is incorrect. Rule 3 of the North Dakota Rules of Appellate Procedure requires only that an Appellant provide a "preliminary statement of issues". Constellation provided this. The Comments to Rule 3 indicate that the purpose of this requirement is to "provide the court information to make a preliminary determination whether oral argument is unnecessary." Thus, such requirements are not even designed for the benefit of the other parties. Constellation briefed issues concerning the August 6, 2015 Order in its initial Brief dated February 11, 2016 and both Defendants were given sufficient time to respond. Constellation has not violated the Rules of Appellate Procedure and the Defendants have not

been prejudiced. Constellation's challenge of the District Court's August 6, 2015 Order is appropriate.

CONCLUSION

[¶17] The District Court's September 22, 2015 Judgment, and the preceding Orders upon which the Judgment is based, should be reversed, and the case remanded.

Dated this 28th day of March, 2016.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for Plaintiff/Appellant in the above matter, and as authors of the Reply Brief of Plaintiff/Appellant, hereby certify in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure that the Reply Brief of Plaintiff/Appellant was prepared with proportional type face and that the total number of words in the Reply Brief, excluding words in the Table of Contents, Table of Authorities, signature block and Certificate of Compliance totals 1904.

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The undersigned, being first sworn, says upon her oath that on March 28, 2016, she delivered via e-mail a true and correct copy of each of the following:

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Dated this 28th day of March, 2016.

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Subscribed and sworn to before me this 28th day of March, 2016.

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Notary Public
State of North Dakota
My Commission Expires Aug. 19, 2021

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